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No. 00-809

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ENRON POWER MARKETING, INC.,

Petitioner,

—v.—

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATE PUBLIC SERVICE COMMISSIONS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit correctly affirmed a Federal Energy Regulatory Commission (FERC) decision that it lacked jurisdiction under the Federal Power Act (FPA) subchapter 2, 16 U.S.C. §§ 824, *et seq.*, to regulate the transmission of electric energy "bundled" (*i.e.*, combined) with the retail sale of the electricity?*

2. Does the D.C. Circuit decision, which—unlike its confirmance of FERC's treatment of "unbundled" transmission—is consistent with 70 years of state/federal dual regulation of energy matters, raise a question warranting certiorari?

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* "Unbundling" permits competition for energy sales to retail customers by breaking ("unbundling") a monopoly rate for delivery of energy *and* energy into two rates; one for energy and the other for delivery.

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STATEMENT OF THE CASE

A. Enactment Of The Federal Power Act

After electricity is generated, it is either: (i) transmitted and locally distributed to the ultimate consumer (a retail sale) or (ii) transmitted and sold to a reseller (a wholesale sale) who then transmits and distributes the power to the consumer (again, a "retail sale"). Retail electric service has historically been "bundled," that is, the utility has levied one rate for both the commodity and its delivery. State commissions have regulated, and

continue to regulate, all aspects of bundled retail transactions, including service issues.

In 1934, Congress passed the FPA. Its stated purpose was not to override state regulation, but to fill a jurisdictional gap created by a Supreme Court decision barring states from the regulation of rates for wholesale energy sold across state lines. *Public Utilities Comm'n of Rhode Island v. Attleboro Steam and Electric Co.*, 273 U.S. 83, 89 (1927). Because, in the absence of federal regulation, there would be no regulation of interstate sales, Congress filled this "*Attleboro* Gap" by empowering the FPC to regulate wholesale electricity rates. Hence, 201(a) provides that "federal regulation is to extend *only* to those matters which are *not* subject to regulation by the States" (emphasis added).

In closing the "*Attleboro* Gap," Congress preserved the states' jurisdiction over the intrastate retail transmission of electricity. In fact, the FPA expressly safeguarded state regulation by, among other things, prohibiting the FPC, now the FERC, from regulating (a) any aspect of the delivery of electricity from a generator to a retail consumer in the same state,[1] or (b) the use of local distribution facilities.[2]

B. FERC's Decision

In the decision under review, FERC, among other things, preempted the states' jurisdiction of the transmission of electricity from a power plant to a retail customer in the same state when states "unbundle" the commodity from delivery (presumably to implement retail competition). FERC, however, recognized traditional state control over bundled retail sales.

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[1] FPA §§ 201(a), (b)(1), (c) [16 U.S.C. §§ 824(a), (b) and (c)]; 212(h) [16 U.S.C. § 824k(h)].

[2] FPA § 201(b)(1) [16 U.S.C. § 824(b)(1)].

FERC observed that jurisdictional lines over bundled transactions were drawn on the basis of whether a transaction included either retail or wholesale sale of electric energy. Enron Appendix, "App." 304a, FERC Order 888 at 31,780. Thus, FERC adhered to the law with respect to bundled sales, concluding "that when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail." Enron App. 306a, FERC Order 888 at 31,781. It adhered to its position on rehearing. Enron App. 455a, FERC Order 888A at 30,225-226.

C. The D.C. Circuit's Decision

On June 30, 2000, a Panel of the D.C. Circuit upheld both aspects of FERC's decision with respect to its jurisdiction over transmission. In upholding FERC's preemption of state regulation of retail transmission, the D.C. Circuit concluded that FERC had jurisdiction over transmission services if a state chose to unbundle retail rates.

The Court concluded, however, that FERC was not required to mandate unbundling and assert jurisdiction over all retail transmissions. It decided that "[a] regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission services in interstate commerce or as an integral component of a retail sale." Enron App. 35a. It concluded that "FERC's decision to characterize bundled transmissions as part of retail sales subject to state jurisdiction therefore represents a statutorily permissible policy choice to which we must also defer under *Chevron*." Enron App. 35a.[3]

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[3] The states have petitioned for certiorari from the decision to uphold FERC power over unbundled retail transmission. The strain Enron observes in the D.C. Circuit decision (Enron at 12) was most

REASONS FOR DENYING THE PETITION

Enron's petition for certiorari raises a question resembling that involved in *Northern States Power Co. v. Federal Energy Regulatory Comm'n*, 176 F.3d 1090, 1096 (8th Cir. 1999), *rehearing denied*, 1999 U.S. App. Lexis 23493 (8th Cir. 1999), *cert. denied*, 120 S.Ct. 1221, ___ U.S. ___ (2000). [FPA does not allow FERC to curtail electrical transmission to retail customers.] The D.C. Circuit should have upheld FERC's decision not to preempt the states' longstanding regulation of bundled transmission because there is no indication that Congress intended to preempt state regulation. *Hillsborough County, Florida v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985) ["Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, ___ U.S. ___, 69 U.S.L.W. 4048, 4051 2001 U.S. LEXIS 640 (January 9, 2001) [not applying *Chevron* in concluding Army Corps of Engineers does not have authority over isolated ponds, some only seasonal, under 404(a) of the Clean Water Act]. The D.C. Circuit nonetheless reached the correct result—an affirmance of FERC's decision—by applying the deferential standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Enron argues, however, that FERC has control over all "transmission of electric energy in interstate commerce,"

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likely due to that court's need to distinguish its "incorrect" conclusion regarding unbundled retail transmission from its correct conclusion regarding bundled retail transmission.

including transmission as part of bundled retail sales (Enron at 10-11). Enron's position amounts to a claim that FERC, and its predecessor, the FPC, have misread the FPA for more than 65 years. In other words, Enron has asked the Supreme Court to apply an interpretation of the Federal Power Act that neither FERC nor its predecessor has ever applied and that would depart from historical federal-state jurisdiction "by permitting federal encroachment on a traditional state power." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 69 U.S.L.W. at 4051, 2001 U.S. Lexis 640 *23-24.

Enron relies upon the D.C. Circuit's incorrect conclusion that FERC has jurisdiction over unbundled retail transmission. That decision is in error, both because the D.C. Circuit applied the wrong standard, and because Section 201(c) of the FPA specifically defines the transmission of electric energy in interstate commerce as being transmitted from one state and consumed in another.[4]

In any event, the D.C. Circuit got the result right on transmission bundled with retail sales. Under the FPA, FERC may regulate only those matters that cannot be regulated by the states. FPA 201(a), [16 U.S.C. § 824(a)]. States have always set rates for, and controlled the terms and conditions of, transmission service when bundled with retail electric rates. Congress has directed that bundled retail transactions remain state jurisdictional. *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 212-15 (1964) [There is a "bright line" between state power over retail sales and federal power

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[4] That section provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a state and consumed at any point outside thereof."

over wholesale sales]. The transactions at issue, the transmission of energy that is part of a bundled retail sale, are retail. *See General Motors Corporation v. Tracy*, 519 U.S. 278, 294 (1997) [state can distinguish between bundled utility service and unbundled supply of gas in levying taxes]. Enron fails to acknowledge that under FPA § 212(h) the decision whether even to allow the competitive transmission of energy to a retail customer lies with the states, not with FERC.[5] Enron's attempt to rely on case law under the Natural Gas Act for the proposition that FERC, not the states, must regulate the transmission component of a bundled retail sale is misplaced. The Natural Gas Act cases cited by Enron address the question, not present here, of the regulation of the interstate transport of gas (*i.e.*, gas was produced in one state and consumed in a second state). That regulation was considered "practically beyond the competence of state regulatory agencies." *Federal Power Comm'n v. Louisiana Power & Light*, 406 U.S. 621, 641 (1972). Compare, FPA § 201(c) [interstate transmission involves electricity "transmitted from a state and consumed at any point outside thereof."]

Enron's further argument that FERC must exercise its alleged jurisdiction over all transmission to protect competitive electric providers fails because (1) FERC simply does not have jurisdiction to address discrimination in the provision of bundled retail service, and (2) the hindrances to competition that Enron alleges have not been shown to exist, but even if they did, they create no basis for restricting state power over retail rates; and (3) alleged problems with a statutory grant provide no reason to ignore the will of Congress and change the grant. *Louisiana Public Service Comm'n v.*

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[5] That section provides that "[n]o order issued under this chapter shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate consumer. . . ."

Federal Communications Comm'n, 476 U.S. 355, 376 (1986) ["As we so often admonish, only Congress can rewrite this statute"]. In any event, FERC can still address discrimination in the provision of wholesale services (assuming such discrimination exists) by either lowering wholesale rates or requiring increased transmission capability.

POINT I

THE D.C. CIRCUIT WAS CORRECT IN CONFIRMING FERC'S HOLDING THAT THE FEDERAL POWER ACT LEFT THE STATES JURISDICTION OF TRANSMISSION IN A BUNDLED RETAIL SALE

1. The Federal Power Act Safeguards State Jurisdiction Over All Intrastate Retail Transactions, Particularly Bundled Retail Transactions, By Creating A "Bright Line" Between Wholesale/Retail Transactions. Enron claims that the Federal Power Act on its face gives FERC control over all transmission in interstate commerce, whether wholesale or retail, bundled or unbundled (Enron 13). The statute on its face only gives FERC control over the "transmission of electric energy in interstate commerce," which FPA § 201(c), [16 U.S.C. § 824(c)], defines as energy "transmitted from a State and consumed at any point outside thereof." The statute thus applies only to transmission transactions occurring between states.

The D.C. Circuit has, contrary to the language of the statute, decided that all *unbundled* transmission on an electric grid connected to other states, even transmission from generators to customers in the same state, is transmission in interstate commerce. Enron App. 34a. Enron cites the decision of the D.C. Circuit on unbundled trans-

mission to the effect that where utilities interconnect, inevitably "some" energy is transmitted across state lines. *Id.* However, the transport of *some* energy across state lines does not mean *all* energy is subject to federal regulation.[6]

In any event, the D.C. Circuit properly decided the FPA does not give FERC control over transmission when *bundled* with retail sales of energy. The statute specifically deprives FERC of jurisdiction over "any other sale of electric energy. . . ." FPA § 201(b) [16 U.S.C. § 824(b)]. Enron's argument for jurisdiction over transmission incident to bundled sales ignores the FPA's overarching goal, which is to delineate state and federal jurisdiction and preserve state jurisdiction by limiting federal regulation "to those matters which are not subject to the States." FPA § 201(a) [16 U.S.C. § 824(a)].

This Court has emphasized that the purpose of the FPA was to "adopt the test developed in the *Attleboro* line which "denied state power to regulate a sale 'at *wholesale* to local distributing companies' and allowed state regulation of a sale 'at local *retail* rates to ultimate consumers.' " [emphasis added; citation omitted]. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 214. *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 308 (1953) ["Congress interpreted [*Attleboro*] as prohibiting state control of wholesale rates in interstate

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[6] Enron relies upon *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) to support FERC jurisdiction over all transmission on an interconnected grid, but that case just upheld FPC jurisdiction over utility books and records, not over all transmission on a utility system, and especially not bundled retail transmission. *FPC v. Southern California Edison*, also cited by Enron, supports FERC jurisdiction over wholesale sales and service in interstate commerce, but specifically states Congress meant to draw a "bright line easily ascertained, between state and federal jurisdiction . . . ." 376 U.S. at 215-16.

commerce for resale, and so armed the Federal Power Commission with precisely that power."]. In giving the FPA power over matters the states could not regulate, Congress protected the states' power over matters they could regulate. *FPC v. Southern Cal. Edison Co.*, 376 U.S. at 215-16.

Enron relies (at 13) upon a statement by the D.C. Circuit that FPA §§ 201(a) and (b) confer on FERC jurisdiction over the transmission of electric energy in interstate commerce. As the D.C. Circuit held, however, Congress' preservation of retail sales jurisdiction also preserves the states' jurisdiction (§ 201(a)) over transmission bundled with retail sales. Enron App. 35a. Bundled retail sales by definition include the transmission associated with such sales. *Northern States Power Co. v. Federal Energy Regulatory Comm'n*, 176 F.3d 1090, 1096 (8th Cir. 1999), *rehearing denied*, 1999 U.S. App. LEXIS 23493 (8th Cir. 1999), *cert. denied*, 120 S. Ct. 1221, ___ U.S. ___ (2000) [wherein the Eighth Circuit found that FERC's "attempt to regulate the curtailment of electrical transmission on native/retail consumers is unlawful, as it falls outside of the FPA's specific grant of authority to FERC."].

Finally, Enron's claim that the D.C. Circuit should have held FERC has jurisdiction over transmission incidental to bundled retail sales flies in the face of the Energy Policy Act of 1992 (EPAct), which precludes FERC from ordering retail wheeling. FPA § 212(h) [16 U.S.C. § 824k(h)], reserves to the states the decision whether to even allow transmission directly to retail customers.[7] Thus, while the statute clarified FERC's authority to order utilities to provide transmission service, it also "prohibited FERC from

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[7] Indeed, the D.C. Circuit was incorrect in speculating that FERC might conceivably have jurisdiction to mandate unbundling (Enron App. 35a), because § 212(h) denies FERC any authority to require any unbundling of retail transactions.

forcing utilities to engage in 'retail wheeling,' the transmission of power directly to a retail customer." House Comm. on Energy and Commerce, Energy Policy Act of 1992, P.L. 102-486, House Report No. 102-474(I) at 140 (1992), *reprinted in* 1992 U.S.C.C. A.N. 1953, 1963.

Enron complains (at 16) that the D.C. Circuit's decision to uphold FERC's interpretation of § 201(b) would make its jurisdiction contingent on whether the utility selects bundled or unbundled pricing. The decision to provide unbundled retail service is made by state regulators under § 212(h) [16 U.S.C. § 824k(h)], which provides in pertinent part, that "[n]o order issued under this chapter shall be conditioned upon or require the transmission of electric energy: (1) directly to an ultimate consumer, or (2) to, or for the benefit of an entity if such electric energy would be sold by such entity directly to an ultimate consumer . . . ."[8] Therefore, FERC cannot require transmission to an ultimate consumer.

2. Precedent From The Natural Gas Act Does Not Support FERC Jurisdiction Over Bundled Retail Transmission. Enron relies on case law involving interstate transmission of natural gas. *Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). *Mississippi River Transmission Corp. v. Federal Energy Regulatory Comm'n*, 969 F.2d 1215 (D.C. Cir. 1992). In *Federal Power Comm'n v. Louisiana Power & Light Co.*, this Court held the FPC could curtail interstate transportation of natural gas to industrial customers, although the transportation was occurring in association with nonjurisdictional direct sales of natural gas to those customers and the FPC lacked rate setting authority with respect to those customers. 406 U.S. at 640-41. The hold-

[8] Section 212(h) finally provides that "[n]othing in this subsection shall affect any authority of any State or local government under State law concerning the transmission of electric energy directly to an ultimate consumer."

ing does not support Enron's position because the Court did not conclude that FERC acquired jurisdiction over the transportation component of a sale to a retail customer.[9]

Enron also relies on the distinction in *FPC v. Louisiana Power & Light* between the FPC's jurisdiction over transportation of natural gas and its jurisdiction over gas sales, and the Court's consequent statement that the Act applies to the interstate transportation of gas regardless of its ultimate disposition (Enron at 15, citing 406 U.S. at 636). This claim, like many of Enron's arguments, begs the question of whether a transaction is an interstate one subject to federal power or a retail intrastate one subject to state jurisdiction. It is well-established that the states retain jurisdiction over retail sales of gas, including control over the bundled sale of gas. *General Motors Corporation v. Tracy*, 519 U.S. 278, 301-302 (1997).

Enron's further reliance on *FPC v. Louisiana Power & Light* for the proposition that FERC must be able to prevent discrimination in favor of retail customers (at 20-21) is misplaced because Enron seeks to obtain a result the Court rejected in *FPC v. Louisiana Power & Light*. The concern in *FPC v. Louisiana Power & Light* was that if FERC had no jurisdiction over curtailment of gas for direct sales, then interruptible and direct customers

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[9] Of critical importance to this Court's decision in *FPC v. Louisiana Power & Light* was that "[c]omprehensive and equitable curtailment plans for gas transported in interstate commerce . . . are practically beyond the competence of state regulatory agencies." 406 U.S. at 641. The impracticality of state regulation of interstate gas transportation arose because of the "unavoidable conflict between producing and consuming states. . . ." 406 U.S. at 633-634. Natural gas fields are centralized in certain states and a network of interstate pipelines deliver the product to local distribution companies regulated by state commissions. In contrast, unlike centralized natural gas collection and transportation, electricity can usually be supplied by generators located near the customer base.

would not be curtailed, while resale customers would be a result the Court rejected, noting that industrial customers would demand contract volumes "while homes, hospitals and schools suffer from lack of adequate service." 406 U.S. at 632. Here, Enron seeks to compel such curtailment of retail customers in favor of its own usage of the transmission system by calling protection of retail customers "discrimination." Enron at 17-19.

Mississippi River Transmission Corp. v. FERC similarly involved interstate transportation combined with a direct sale, not gas sold to a local distribution company for sale to an ultimate consumer. Enron relies heavily (at 16) on language from the D.C. Circuit opinion in *Mississippi River Transmission Corp.* that FERC sought to regulate the transmission component of a bundled direct sale service. The transportation in that case was occurring between states[10] and therefore could not be practically regulated by the states, as the D.C. Circuit recognized. 969 F.2d at 1218. In contrast to both *FPC v. Louisiana Power & Light* and *Mississippi River Transmission Corp. v. FERC*, Enron seeks to obtain FERC jurisdiction over the transmission component of a bundled retail sale that can effectively be regulated by state regulators—indeed, that has been so regulated since before the passage of the Federal Power Act.

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[10] Mississippi River Transmission Corporation transported "natural gas from wellheads in Texas, Oklahoma and Louisiana to customers in Missouri, Illinois, Arkansas and Louisiana." 969 F.2d at 1216-17.

POINT II

ENRON'S CLAIM THAT FERC JURISDICTION IS REQUIRED TO PREVENT DISCRIMINATION BY OWNERS OF INTERSTATE TRANSMISSION FACILITIES DOES NOT MERIT THIS COURT'S REVIEW BECAUSE, AMONG OTHER THINGS, THE D.C. CIRCUIT'S DECISION DOES NOT DISCOUNT FERC'S (OR THE STATES') ABILITY TO ADDRESS DISCRIMINATION

Enron alleges that FERC's lack of jurisdiction over electric transmission incident to bundled retail sales will allow transmission owners to discriminate in favor of their own unbundled retail sales, and that it therefore presents a legal question of the greatest practical importance (*see*, for instance, Enron 19-20). FERC was under no duty to remedy discrimination in the provision of bundled retail electric sales because it has no jurisdiction over those transactions. As this Court stated in *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276 (1976), FPA § 206(a) only allows FERC to remedy discrimination it finds to have been committed "by any public utility for any transmission or sale *subject to the jurisdiction* of the Commission" (emphasis added). FPA § 206(a), 16 U.S.C. § 824e(a).[11]

In any event, Enron's position is factually incorrect. It constitutes, in effect, a policy argument that the nation would be better off if the FPA allowed FERC jurisdiction over all transmission. Congress has, however, decided that the states are to protect retail customers.

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[11] This Court similarly described the history of § 205 (FERC's rate setting powers) as being "expressly limited to jurisdictional sales to foreclose the possibility that the Commission would seek to correct an alleged discriminatory relationship between wholesale and retail rates by raising or otherwise regulating the nonjurisdictional, retail price." *FPC v. Conway Corp.*, 426 U.S. at 277.

1. Congress Has Made A Policy Decision That The Nation Is Better Off If The States Are Responsible For Protecting The Interests Of Retail Customers. Enron argues (at 17-18) that Congress has in the Energy Policy Act (EPAct) emphasized the importance of interstate competition for supplying energy needs. It fails to acknowledge, however, that Congress was acting to encourage *wholesale* competition.[12] The history of EPAct, as well as that statute's plain language, shows Congress left to the states the question of whether there would be retail competition when it enacted FPA Section 212(h), 16 U.S.C. § 824k(h). Contrary to statements in Enron's brief (*see* Enron note 8), Congress made it clear in FPA 212(h), quoted at p. 10, *infra*, that FERC does not have jurisdiction to require retail competition.

Enron argues that there is an important question as to whether FERC must regulate the transmission component of a bundled rate, because otherwise a regulatory void will result, citing this Court's decision in *FPC v. Louisiana Power & Light* (at Enron 20-21) and *Federal Power Comm'n v. Transcon Gas Pipeline Corp.*, 365 U.S. 1, 28 (1961) (at Enron 21-22). An alleged "*need* for federal regulation does not establish FPC jurisdiction that Congress has not granted." *FPC v. Louisiana Power & Light Co.*, 406 U.S. at 635-36. Enron's position, moreover, is misplaced because the alternative to federal regulation of the transmission component of bundled retail sales is state regulation, not nonregulation. Inasmuch as

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[12] The legislative history of the Energy Policy Act of 1992 states that "[t]he bill's electricity provisions will promote additional competition in *wholesale* electricity power market in order to improve the efficiency of the electric utility industry and secure the lowest possible costs for consumers" (emphasis added). House Comm. on Energy and Commerce, Energy Policy Act of 1992, P.L. 102-486, House Report No. 102-474(I) at 138 (1992), *reprinted in* 1992 U.S.C.C. A.N. 1953, 1961.

state regulation *is* possible, the policy behind the federal statutes is to defer to state regulation of retail rates. *FPC v. Transcon Gas Pipeline*, 365 U.S. at 19 ["[t]hat is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area . . ."].

The Eighth Circuit has recently addressed the need to protect retail customers when existing transmission lines are overloaded. *Northern States Power Co. v. FERC*, 176 F.3d at 1095. ["As indicated, when the circumstances require curtailment in the transmission of electricity, most wholesale customers may use alternative supplies from other utilities who generate power themselves, and can avoid power outages through such practices. The native/retail consumer, however, is unable to turn to alternative sources of supply"]. Under Enron's reading of the FPA, retail customers would lose service so that utilities could transport power from competitive wholesalers, a completely catastrophic result.

2. In Any Event, Enron's Claims of Discrimination Do Not Create An Important Question Because Enron Ignores The Reality That FERC Can Address Any Problems Arising From Supposed Wholesale Discrimination, While Problems With Retail Rates Have Been Left To The States. FERC can address Enron's claims that transmission owning utilities would be free to charge more than they themselves pay for a comparable service (Enron 19, 20). Thus, for instance, FERC has jurisdiction to avoid a "price squeeze" by lowering wholesale sales or transmission rates in order to prevent competitors from being charged a noncompetitive rate. *FPC v. Conway Corp.*, 426 U.S. at 278-79.[13]

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[13] A price squeeze can occur when a vertically integrated firm operates at two levels of an industry, and its competitors at one level (for instance, the retail level) are its customers at another (for

FERC did, moreover, act to preclude any discrimination in wholesale transmission service in its Order 888. FERC has precluded discrimination in wholesale services by requiring utilities to provide any transmission capacity, above the amount reserved for retail consumers, to competitors on a nondiscriminatory basis.[14] Under the FERC open access tariff, moreover, a "Transmission Provider will be obligated to expand or upgrade its Transmission System" where necessary, though the "Transmission Customer must agree to compensate the Transmission Provider for any necessary transmission facility additions. . . ." Pro Forma Open Access Transmission Tariff, Appendix D to FERC Order 888, ¶ 13.5[15].

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instance, the wholesale level). *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991). The price squeeze arises when a monopolist at the wholesale level sets the wholesale price too high and the retail price too low, denying its competitors a "living profit," because they cannot buy the service at a wholesale price low enough to resell at a retail price high enough to cover costs. This pricing deadlock "squeezes" the competitors out of the market, allowing the wholesale monopolist to become a retail level monopolist. *United States v. Aluminum Co. of America*, 148 F.2d 416, 437 (2d Cir. 1945) (*Alcoa*).

[14] This "available transmission capacity" (ATC) is to be provided to utility competitors making sales for resale at the same prices and terms at which utilities use that capacity themselves. FERC Order 888 at 31,700, Enron App. at 237a; FERC Order 888-A at 30,217, Enron App. 452a. Such provision of ATC is a full implementation of FERC responsibilities to preclude discrimination under FPA §§ 205 and 206.

[15] A state or its subdivisions would decide where a transmission line could be sited, consistent with state or local environmental or property laws. See FPA § 211(d)(1)(C)[16 U.S.C. § 824j(d)(1)(C)] [order directing transmission service terminated where transmitting utility "has failed, after making a good faith effort, to obtain the necessary approvals or property rights under applicable Federal, State and local laws."]. *Dunk v. Pennsylvania Public Utility Comm'n*, 434 Pa. 41, 252 A.2d 589 (1969), *cert. denied*, 396 U.S. 839 (1969) [FPA does not give FERC jurisdiction over construction of electric facilities.].

Such reinforcement of the transmission system for a price paid by the transmission customer is a far better recourse than that apparently sought by Enron, which would require curtailment of retail customers as a result of insufficient capacity on the transmission system.[16]

Enron contends (at 21) that the bifurcation of transmission into bundled and unbundled uses will allow a transmission owner to reserve a portion of the interstate grid "at no charge" for its retail load and then divert power into the competitive wholesale market. This argument misstates the operation of FERC's open access procedures, which do not permit reservation of capacity not needed for retail load.[17] Further, when a utility reserves and schedules transmission capacity on its portion of the interstate grid, it does not do so at "no charge." Rather, it forgoes revenue from wholesale customers as a result of its incorrect scheduling. The utility is not likely to recover that lost income in the short-term market by releasing the reserved capacity at the last moment.

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[16] This possibility of reinforcement fully addresses Enron's hypothetical about a state blocking interstate transmission by keeping retail sales bundled (Enron 20, n. 8). Utilities in that state can be required to provide additional transmission capacity for competitive providers. In any event, Congress has in § 212(h) of the FPA left the decision whether to have retail competition to the states.

[17] FERC limited the ability of utilities to reserve transmission capacity for native load. It stated:

> The transmission provider may reserve in its calculation of ATC transmission capacity necessary to accommodate native load growth *reasonably* forecasted in its planning horizon. However, the transmission provider is obligated to provide transmission service to others under the Final Rule pro forma tariff out of capacity reserved for native load growth up to the time the capacity is actually needed for such future needs (emphasis added).

FERC Order 888 at 31,765, Enron App. at 267a.

Finally, the states have power to address any discrimination that increases rates to retail customers. Enron asserts (at 20) that states have no authority to regulate interstate transmissions under the Commerce Clause, relying on *Public Utilities Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). That case, however, is one of a line of cases that *allow* state regulation of retail sales. 273 U.S. at 88 [citing *Pennsylvania Gas Co. v. Public Serv. Comm'n, Second District of the State of New York*, 252 U.S. 23 (1920); *Public Utilities Comm'n v. Landon*, 249 U.S. 236 (1919)].[18] A utility attempting to increase rates for retail customers by reserving excess transmission capacity would probably see state regulators impute the revenues lost due to improper scheduling. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986) ["Without deciding this issue, we may assume that a particular *quantity* of power provided by a utility from a particular source could be deemed unreasonably excessive [by a state commission] if lower cost power is available elsewhere . . ."]; *Rochester Gas and Electric Corporation v. Public Service Comm'n of the State of New York*, 754 F.2d 99 (2d Cir. 1985) [upholding NYPSC imputation of incidental sales from wholesale revenues]. Thus, a utility has an incentive to accurately reserve capacity.

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[18] Further, the Commerce Clause limitations created by *Attleboro* have been eroded and *Attleboro* is now no longer good Constitutional law. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). *Attleboro* only has validity to the extent it is used as a guide to FPA construction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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